IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2985 of 1996

to

FIRST APPEALNo 3010 of 1996

with

CIVIL APPLICATION No 7594 of 2003

Date of Decision: /10/2004

UNITED INDIA INSURANCE CO.LTD.

Versus

VALJIBHAI VASHRAMBHAI MONPARA DECEASED BY HIS HEIRS.

(for full cause title, see next sheet)

Coram:

The Hon'ble Mr.Justice Bhawani Singh, Chief Justice

The Hon'ble

Whether approved for reporting?

For the Appellant Mr.Adv.P.V.Nanavati
[Insurance Company]
For the Respondent Mr.Adv.V.B.Gharaniya

PER: H.K.RATHOD, JUDGE (CAV):-

Heard learned advocate Mr.P.V.Nanavati on behalf

of the appellant-Insurance Company and learned advocate Mr.V.B.Gharaniya for respondents - Claimants.

Whether reporters of Local Papers may be allowed to see the Judgment?

.RS 2.

#. In this group of appeals, award passed by the Motor Accident Claims Tribunal at Bhavnagar in M.A.C. Petition No.202 of 1992 [main matter] with other petitions being Nos.203, 244, 245, 204, 235, 243, 246, 248, 254, 261, 262, 247, 282, 284, 285, 290, 291, 292, 293, 294, 297, 298, 299, 300, 301, 302, 303, 307, 308, 309, 310, 263, 264, and 266 of 1992 dated 9th April, 1996 is under challenge.

#. All these claim petitions arising out of one motor vehicular accident which had taken place on 14th January, 1992 at about 0.30 Hrs. [a.m.] near outskirts of village Ambla on Bhavnagar - Rajkot State Highway. As the common question of law and facts are involved in this group of appeals, the subject matter is same award, the Tribunal has consolidated and disposed of by common judgment. The Tribunal had recorded evidence in M.A.C.Petition No.202 of 1992.

#. The brief facts of the case are as under :

In the accident in question, one mini luxury bus bearing registration number GJ-4-T-3049 is involved and is completely burnt with its all 35 occupants. According to the claim form Exh.48 produced by the opponent-1 before the Insurer, one Girirajsinh Dilawarsinh Chudasama was driver of the said mini luxury bus at the relevant time. The whereabouts of said Girirajsinh Dilawarsinh Chudasama are not known to anyone and he is also feared to be dead in this tragic accident. Looking to the immediate aftermath of the incident setting ablaze the mini luxury bus, there was no room for any of the occupants of the bus to escape. Except one Ghanshyambhai Devjibhai who was also traveling in the ill fated bus, all the passengers are burnt alive. As all the dead bodies were completely burnt and reduced to ash, identification was impossible and therefore, only one inquest Panchnama comprising the names of all occupants of the bus is prepared. According to the claimants, the driver of the said mini luxury bus was driving it in rash and negligent manner at excessive speed and endangering the human lives. The said mini luxury bus belongs to opponent-1 and was duly insured with the opponent-2 - The appellant United Insurance Company Ltd.. Most of the

deceased are girls aged between 20 to 25 years, working in Madhav James - a diamond factory as diamond cutter. The claimants are the legal heirs and representatives of all the deceased persons, they sustained damages and great loss and therefore, claim petitions were filed before the Tribunal. All the deceased girls were working in Sihor branch of Madhav James as diamond cutting labourers. According to the claimants, all the deceased girls including the Manager of Sihor Branch Diamond Factory had organised a tour programme of Tulsi-shyam [Saurashtra] and Prabhas-Patan. For that purpose, they had engaged one mini luxury bus bearing registration number GJ-4-T-3049 of Ashapura Travels. The date and time of the tour programme was finalised and it was decided to proceed on the night of 13.1.1992. Accordingly, all the preparations of the tour programme were made and as decided, all the deceased were waiting for the said Mini Luxury Bus at Sihor. The family members of all the deceased had come to escort the tour party and it was just like a mini festival. The said bus started from Bhavnagar and reached Sihor at 11.45 P.M. on 13.1.1992. All the deceased boarded the said mini luxury bus and started for Tulsi-Shyam. According to the claimants, driver of the mini luxury bus GJ-4-T-3049 was driving the said bus in rash and negligent manner, in excessive speed endangering the human lives. When the said bus reached near the turn of village Ambla, due to rash and negligent driving of driver of the said mini luxury bus, it dashed with the bridge on the road, caught fire and fell in the bridge. There was no chance for all the occupants of the bus to escape and all of them were burnt alive, except one Ghanshyambhai Devjibhai. All the dead bodies of the deceased were completely burnt and reduced to ash and therefore only one Inquest Panchnama was drawn comprising the names of all the deceased. Offence was registered and investigation was carried out. On hearing the said news of tragic incident, Sihor observed a black-day and complete Bandh on the day of the unfortunate incident. The citizens and leading personality of the city made a public appeal for help and thereby collected handsome amount which was disbursed amongst the bereaved family members of the deceased. Accordingly, Rs.40,000/- were paid to the claimants from the fund collected by the social workers and leading personality of the area. In all, 35 petitions were filed wherein interim compensation of Rs.25,000/has been awarded to all the claimants of each case. It did not transpire from the evidence of the petitioners who was driving the said mini bus at relevant time. The owner of the bus opponent-1 has filed one accident claim form before the insurer viz. appellant. In that claim form,

vide Exh.48 the owner stated that one Girirajsinh Dilawarsinh Chudasama was driving the said luxury bus at the relevant time. Thereafter, one certificate was produced by the owner at Exh.114 in which it is stated that Girirajsinh Dilawarsinh Chudasama was holding a valid driving licence even to drive heavy motor vehicle. Licence number is also mentioned in the said certificate. According to the appellant, one employee of R.T.O. Ahmedabad has played mischief and adopted a corrupt practice and he has issued a false certificate. According to the appellant, one rickshaw driver Nanajibhai Velajibhai Parmar was holding the said licence number and it was licence for auto rickshaw only. Accordingly, the main contention was raised by the appellant before the tribunal that driver Girirajsinh was not holding a valid driving licence at material time and therefore, the appellant is not liable for the damages, if any, caused to the claimants.

#. The owner opponent-1 had filed written statement at Exh.37 and denied the averments made in the petitions. The owner raised contentions about limitation and non joinder of necessary parties. The owner has also contended that Mahipatsinh Gohil was not driver of the said bus at the relevant time but one Girirajsinh Dilawarsinh Chudasama was the driver at the material rime and he also expired in the said accident.

#. The appellant - opponent-2 insurance company had filed its written statement vide Exh.15. Appellant has contended before the tribunal denying averments made in the petition and main contention raised was that one Girirajsinh Dilawarsinh Chudasama was the driver according to the owner in the bus at the relevant time. But he was not holding a valid driving licence at material time and he is absconding since the day of the accident. Therefore, contention of appellant is that bus was being plied in violation of the terms and conditions of the permit and also in contravention of the conditions incorporated in the Insurance Policy and therefore, the appellant is not liable for the damages, if any, caused to the claimants. The further contention raised was that in the bus more than prescribed number of passengers were travelling and bus was over loaded at the relevant time. The appellant insurance company has also denied all the averments made in the claim petitions. During the course of pendency of the claim petitions, one application Exh.25 filed by the appellant with a prayer to join M/s Madhav James as necessary party. The Motor Accident Claims Tribunal dismissed the said application by order dated 12th February, 1996. According to the evidence on

record, the deceased persons had given a share of Rs.200/- each and it was one tour of all deceased persons and the said tour was organised visiting Saurashtra at the relevant time. There is no evidence on record that M/s Madhav James, Sihor had hired the said bus for tour programme of all the deceased persons.

#. One passenger Shri Ghanshambhai who fortunately saved out of the said accident, had lodged the complaint. From the police investigation papers, chargesheet was prepared against said Girirajsinh Chudasama whose whereabouts not found and ultimately, it was believed that said Girirajsinh might have succumbed to the injuries in this unfortunate accident. There is no other material from which whereabouts of said Girirajsinh can be found out because P.M. examination could not be done and only one inquest Panchnama was prepared and it was impossible to identify the dead bodies of particular person. However, the Tribunal has presumed that one person was driving the said bus at the relevant time.

#. Thereafter, the Tribunal has framed the issues at Exh.22 in M.A.C.Petition No.202 of 1992 on 7th May, 1992. Thereafter, one application was given by the appellant to add one issue which was allowed and accordingly, Issue No.6 came to be added by order dated 12th February, 1996.

The following issues were framed by the Tribunal.

"(1) Whether the claimants prove that driver of opponent No.1 was rash and negligent in driving motor vehicle bearing No. GJ-4-T-3049 ?

(2) Whether the claimants prove that deceased died because of rash and negligent act of the driver of opponent No.1 ?

(3) Whether the claimants are entitled to any compensation ? If yes, to what extent ?

(4) Who are liable to pay and what extent ?

(5) What order and decree ?

(6) Whether it is proved that the driver Girirajsinh Dilawarsinh was not holding an effective and valid driving licence at the time of accident ? If yes, what is its effect ?"

#. Thereafter, oral evidence was recorded by the Tribunal of the claimants in each petition. No one was

examined by the owner opponent-1 and appellant-opponent-2 insurance company has examined two witnesses one Babubhai Sundarlal Patva, Head Clerk of RTO, Ahmedabad at Exh.200 and Jitendrabhai Kalabhai Bhojani, Administrative Officer of United India Insurance Co. Ltd., Bhavanagar at Exh.217. The Tribunal has allowed documentary evidence to be adduced in all these claim petitions in a manner as mentioned in para-12 of the award.

The opponent-2 appellant-insruance company has produced the following documents before the Tribunal.

(1) Certificate of RTO, Ahmedabad to the effect that Giririajsinh Dilawarsinh Chudasama was holding Motor Driving Licence No.390559 / AR, Base No.32647/AR Exh.114.

(2) Certificate of RTO, Bhavnagar to the effect that of grant of contract carriage permit Exh.213.

(3) Certificate of Fitness of RTO Bhavnagar Exh.214.

(4) Letter of RTO Officer, Ahmedabad enclosing therewith the true copy of T.T.C. Card Exh.215 & 216."

The Tribunal has, thereafter, appreciated the facts, evidence and circumstances of the case on the basis of established principle of law and heard arguments of the respective parties and passed the final order on 9th April, 1996. The Tribunal has passed the final orders in all the petition by partly allowing the petitions. The Tribunal has directed the respondents owner and insurance company - appellant herein to pay jointly and severally the amount of compensation to the claimants together with interest thereon at the rate of 15 % per annum from the date of petitions till realisation with proportionate cost in the following manner.

:	Petition Number :	: Awarded Amount :
1.	202/92	Rs.4,52,000/-
2.	204/92	Rs. 50,000/-
3.	203/92	Rs.4,04,000/-
4.	235/92	Rs.2,12,000/-
5.	243/92	Rs.2,12,000/-
6.	244/92	Rs.1,16,000/-
7.	245/92	Rs.1,16,000/-
8.	246/92	Rs.1,16,000/-
9.	248/92	Rs.1,16,000/-

10. 254/92 Rs.1,16,000/-
11. 161/92 Rs.1,16,000/-
12. 262/92 Rs.1,16,000/-
13. 247/92 Rs.1,16,000/-
14. 282/92 Rs.1,16,000/-
15. 284/92 Rs.1,16,000/-
16. 285/92 Rs.1,16,000/-
17. 290/92 Rs.1,16,000/-
18. 291/92 Rs.1,16,000/-
19. 292/92 Rs.1,16,000/-
20. 293/92 Rs.1,16,000/-
21. 294/92 Rs.1,16,000/-
22. 297/92 Rs.1,16,000/-
23. 298/92 Rs.1,16,000/-
24. 299/92 Rs.1,16,000/-
25. 300/92 Rs.1,16,000/-
26. 301/92 Rs.1,16,000/-
27. 302/92 Rs.1,16,000/-
28. 307/92 Rs.2,12,000/-
    i.e. Rs.2,00,000/-
29. 308/92 Rs.2,12,000/-
    i.e. Rs.2,00,000/-
30. 309/92 Rs. 70,000/-
31. 310/92 Rs.1,16,000/-
32. 263/92 Rs.1,16,000/-
33. 264/92 Rs.1,16,000/-
34. 303/92 Rs.1,16,000/-
35. 266/92 Rs.1,16,000/-

##. This group of appeals and civil applications Nos.7820 to 7845 of 1996 preferred therein admitted by this Court. The Division Bench of this Court [Coram : S.M.Soni and H.R.Shelat, JJ.] vide interim order order dated 7th January, 1997 and accordingly Rule is made absolute in each application. The aforesaid interim order dated 7th January, 1997 is reproduced as under :

"Respondents are duly served. The original claimants are neither present nor represented by Advocate. Original opponent No.1 - owner is present in person before this Court.

Heard the learned Advocates for the applicant.

In the facts and circumstances of the case and in particular in view of the judgment in the case of New India Assurance Co. Ltd. v. Mandar Madhav Tambe & Ors. [AIR 1996 SC 1150], the liability of the insurance company does not arise as it is the case of the applicant that the

driver was not holding any licence, much less valid licence. In view of this fact situation, we are of the opinion that if the applicant company is directed to file undertaking in each matter within four weeks from today, signed by its responsible concerned officer, the further execution of the award qua the company is stayed. The applicant company shall undertake before this Court that in case the applicant fails in the appeal, it shall pay up the award amount with costs and interest within four weeks from the receipt of the certified copy of the judgment and award of this court, irrespective of its desire to challenge the same. In case of default, the concerned officer, even if he might have retired, will be liable for contempt. Rule is made absolute accordingly in each of the matter. No costs.

[S.M.Soni, J.] [H.R.Shelat, J.]"

##. Learned advocate Mr.P.V.Nanavati vehemently raised contention that at the relevant time and when the accident occurred the driver Girirajsinh Dilawarsinh Chudasama was not holding valid driving licence, therefore, appellant insurance company is not liable for the damages, if any, caused to the claimants. He also relied upon the terms and conditions of the insurance policy as well as certificate of the R.T.O. issued to the effect that driver was holding a valid driving licence. According to learned advocate Mr.P.V.Nanavati, said certificate is adduced at Exh.114 which is a false and fabricated document. According to him, the owner had obtained a false and fabricated certificate in respect of the driving licence of the driver. As a matter of fact, licence No.390559 / AR is issued to one Nanaji Velajibhai Parmar and it is a licence in respect of autorickshaw. He also relied upon document Exh.216 to prove the fact about above said licence was issued for driving autorickshaw in favour of said Nanaji Veljibhai Parmar of Ahmedabad. He compared both the documents Exh.114 with Exh.216 and supported that document Exh.114 is false and fabricated document. One witness Babubhai Patva was examined by the appellant vide Exh.200 and he produced card of driving licence No.390559. According to his deposition, this licence is issued from Ahmedabad region and it is a licence of autorickshaw. The said licence of above number is not issued in favour of Girirajsinh Dilawarsinh Chudasama. However, said witness also deposed that R.T.O., Ahmedabad has signed Exh.114 and

also said Shri J.M.Solanki has also signed in this certificate Exh.114. In short, the submission is that certificate Exh.114 is a false document. The second contention raised by learned advocate Mr.Nanavati is that the rate of interest 15 % is on higher side and looking to the present rate of interest prescribed by the Reserve Bank of India, the rate of interest may be reduced to that extent. Except that, no other submission made by the learned advocate Mr.P.V.Nanavati.

##. Learned advocate Mr.Gharaniya for the respondents claimants supported the award passed by the Tribunal.

##. We have considered submissions made by the learned advocates for the parties. The Tribunal, on the basis of the evidence, facts and circumstances of the case, has applied principle of "res ipsa loquitur" to the case. The Tribunal has also considered that it is clear case of gross rashness and negligence on the part of the bus driver. The said accident had taken place during night hours and the bus was on the State High-way. There was a culvert. Said bus dashed with the culvert. As a result thereof, it caught fire and the bus was thrown away in the bank of the culvert. As a result thereof, fire spread over the entire bus and all the 35 persons who were traveling in the bus, succumbed to the injuries except one person Ghanshyambhai, who has lodged the complaint, fortunately saved in this incident. The said incident is really a tragic and unfortunate and pitiable in accident ever happened in the history of accidental crimes. As many as 35 persons succumbed to the injuries and accidental injuries. In the light of these facts, the Tribunal has rightly held that bus was being driven in rash and negligent manner at the relevant time by its driver. Accordingly, the Tribunal has rightly decided the Issue Nos.1 & 2 in affirmative.

##. The Tribunal has examined the Issue Nos.4 & 6 which related to the main contention raised by the learned advocate Mr.P.V.Nanavati that at the relevant time, the driver of the bus was not having valid licence to drive the vehicle. This aspect has been examined by the Tribunal at length and also appreciated the evidence led by the Insurance Company. After considering oral evidence as well as cross examination of the concerned witnesses, the Tribunal discussed in para-45 to 50 of the award. The Tribunal, thereafter, considered various decisions of the High Court and Supreme Court and come to the conclusion that appellant insurance company has failed to prove that person who was driving the vehicle

in question at the relevant time did not possession a valid driving licence. The Tribunal has further come to the conclusion that it is also not proved that driver was disqualified from holding such driving licence. The owner and driver have not been examined by the appellant company. The owner was available. However, he did not step into witness box and no attempt was made by the appellant company to summon the driver. The Tribunal has also discussed that looking to the evidence Exh.114 in which bus and licence number and type of vehicles are also mentioned. It also transpires from the admission in cross examination of the witnesses of the insurer appellant company that Exh.114 cannot be said to be a false document. The Tribunal has also observed that appellant company has not produced correct driving licence of the driver driving the bus in question. Therefore, an adverse inference can be drawn against the insurance company. The Tribunal has also observed that Insurance Company has not placed on record acceptable material in support of their contentions. The burden upon the company to discharge its onus to prove that driver was not having valid driving licence. The appellant company has also failed to discharge its onus of proving the driver had not valid driving licence. In absence of driver, it cannot be said that he did not possess driving licence at all. It is the duty of the insurance company to prove by cogent evidence that a particular person was driving the vehicle in question and further it must be proved that he was not holding a valid driving licence and he was disqualified from holding such licence. The insurance company had not proved by leading oral evidence as to who was driver and whether he had valid driving licence or not. In such circumstances, the insurance company cannot escape from its liability. In view of above observations made by the Tribunal, the relevant discussion of the oral evidence of the witnesses of the insurance company are important and therefore, the same are quoted as under :

"45. Both these issues are closely connected with each other and, therefore, they are answered accordingly. It is the main contention of the insurer that driver Girirajsinh was not holding a valid driving licence at material time and, therefore, the insurer is not liable for the damages, if any, caused to the petitioners. The Insurance Company relies on several authorities and also on the terms and conditions of insurance policy, as well as Certificate of RTO issued to the effect that driver was holding a valid driving licence. That certificate is adduced at

Exh. 114. It is the main contention and argument of the insurer that Exh. 114 is a false and fabricated document. It is argued that a false and fabricated certificate has been obtained by the owner in respect of the driving licence of the driver. It is argued that as a matter of fact, licence No. 390559/AR is issued to one Nanjibhai Veljibhai Parmar and it is a licence in respect of an auto rickshaw. However, on perusal of Exh. 114, it transpire that it is a licence issued to Girirajsinh Dilawarsinh Chudasama in respect of light, medium and heavy motor vehicles. One document Exh. 216 is produced in evidence by the insurer to prove that above said licence was issued for driving auto rickshaw in favour of Nanjibhai Veljibhai Parmar of Ahmedabad. Therefore, comparing Exh.114 with Exh. 216, it is argued that admittedly, Exh. 114 is a false and fabricated document. One witness Babulal Patva is examined at Exh. 200 on behalf of the insurer. He has produced card of driving licence No. 390559. He has deposed that this licence is issued from Ahmedabad region and it is a licence of auto rickshaw. he has deposed that licence of above said number is not issued in favour of Girirajsinh Dilawarsinh Chudasama. He has deposed that RTO Officer, Ahmedabad has signed in Exh. 114 and also one JM Solanki has signed in this certificate Exh. 114. According to him, he is under the belief that Certificate Exh.114 is a false document.

46. This witness is cross examined at length by the LAs of the applicants. His cross examination is very material. He has deposed in para 3 that after following prescribed procedure, Exh.114 has been issued by RTO Officer, Ahmedabad. He has deposed that he has no personal knowledge as to whether any endorsement has been made in RTO Office Ahmedabad to the effect that Exh.114 is issued falsely. He has deposed that Shri Solanki had authority to place his signature in Exh.114. He has also deposed that due to mistake and over sight, licence number might have been wrongly mentioned in Exh. 114. He has deposed that no proceedings have been initiated against Shri Solanki for issuing a false certificate. So many licences are being issued from RTO, Ahmedabad. So many vehicles used to come for inspection. One Register with all the details is kept in respect of all the

licence holders in the office of RTO, Ahmedabad. Nature of licence i.e. licence of heavy, medium or light vehicle is being mentioned therein the register. Fee Register and accounts are also being maintained by the same office. Photoraphs are being affixed in licence and one copy is being kept in the RTO Office. He has deposed that register is being maintained in the office and from that register, it can be said that how many persons are given licence for driving motor vehicles. He has deposed that there is signature of RTO Officer Shri Patel in Exh. 114. He has deposed that now I say that there is signature of one Shri Ganatra alongwith signature of Shri Patel in Exh. 114. He has very specifically deposed that Shri Patel has signed as he has issued this certificate Exh. 114. He has also deposed that signature of issuing authority has been taken lastly. He has also deposed that if the signature of issuing authority is obtained in the certificate then it should be presumed that it is a genuine certificate. This admission is very material. Neither Shri Patel nor Shri Ganatra nor Shri Solanki have been examined in this Tribunal by the insurer. He has very specifically admitted that what is truth that he cannot say. He has clearly admitted that there is no documentary evidence with him to prove that Exh. 114 is a false certificate. He has specifically admitted that details can be given regarding licence holders within a period of 2 to 3 months along with licence number and other details regarding any licence holder. However, it is pertinent to note that licence fee register nor licence register nor cards have been produced by the insurer. There is no evidence that insurer has made any attempt to verify as to whether really Girirajsinh was holding driving licence or not ? All the documents are lying with RTO, Ahmedabad and in possession of the said office. They are the best persons and they have knowledge regarding issuance of of licence in favour of any licence holder. Looking to the admissions given in cross examination, I am of the opinion that insurer has failed to prove that Exh. 114 is a false certificate. Again he has admitted that he cannot say as to whether Certificate Exh. 114 is a false certificate."

Thereafter, the Tribunal considered that the cross examination of Babubhai Sundarlal Patva, Head Clerk

of RTO Ahmedabad is very material. After considering his cross examination, the tribunal observed in para 47 to 50 of the impugned award as under:

"47. On reading the above said cross examination of Shri Patva, he has admitted that they have not informed this Tribunal at any time that Exh.114 is a false certificate. He has admitted that bedge number of the driver is also mentioned in Certificate Exh. 114. Notes regarding bedge number are also being kept in the record of RTO Office, Register in this respect is not produced by the insurer. Bedge number is very material piece of evidence. There is no documentary evidence on record that it is a false bedge number. Bedge No. 32647/AR is mentioned in certificate Exh. 114. There is no evidence to prove that bedge number is also false and fabricated. He has deposed that departmental inquiry is initiated against Shri Ganatra. He has not produced the case papers of the departmental inquiry.

48. It is pertinent to note that this witness has clearly admitted that Certificate Exh. 114 is issued by Shri Solanki. Therefore, question of departmental inquiry against Shri Ganatra does not arise.

49. One witness Jitendrabhai Bhojani, Administrative Officer of insurer is examined at Exh. 217 to prove the insurance policy Exh. 43. He has deposed that one claim form was filed by Opponent No.1 in his office. On perusal of that claim form Exh. 48, the insurer has made inquiry and obtained a letter from RTO Ahmedabad to the effect that licence of above said number was issued in respect of Manjibhai Valjibhai Parmar and it is a licence of auto rickshaw. That letter is produced at Exh. 47. It is pertinent to note that immediately thereafter, insurer has not informed this Tribunal that a false certificate has been obtained by the owner. They have not produced any documentary evidence to the effect that they written a letter to the opponent No. 1 for the particulars of licence number. He has deposed that there is a Vigilance Department in the office of the insurer. That department has made an inquiry regarding this licence but no papers or any document has been produced by the insurer to that effect. He has no personal

knowledge as to whether Girirajsinh was driving the said bus or not. He has deposed that on perusal of Exh. 48 i.e. claim form, he is of the opinion that Girirajsinh was driving the bus at the relevant time. He has admitted that insurer has not issued any notice to residential house of driver or at his business premises. It is pertinent to note that there are so many RTO Offices situated in Gujarat State. It transpires from evidence that there is RTO Amreli. It is significant to note that licence number is 32647/AR. Whatever it may be, insurer has not produced any evidence to prove that Exh. 114 is a false and fabricated document. On the contrary, from the admissions given in cross examination by witness Shri Patva, it clearly transpires that it is a genuine document. Assuming for the sake of arguments that it is a false document, then also, it is not proved that said Girirajsinh was disqualified from holding a valid driving licence. It is not sufficient to prove that he was not holding a driving licence but further it must be proved that he was disqualified from holding such licence.

50. It is vehemently argued by the learned advocate of the insurer that the insurer is liable for the 26 persons only. For this, he relied on the insurance policy and terms and conditions of the said policy. On perusal of insurance policy, it transpires that the insurance cover is for 26 persons and, therefore, the insurer can be held liable for 26 persons only. There is no dispute about this. "

##. After considering the observations made by the Tribunal, while appreciating the evidence of the witnesses produced by the appellant insurance company, according to our opinion, the Tribunal has rightly dealt with contentions raised by the insurance company. Recently, the Apex Court in case of NATIONAL INSURANCE COMPANY LTD V. SWARAN SINGH AND OTHERS, 2004 AIR SCW 663 has considered the issue and while making the following observations which read as under :

"Insurer is entitled to raise a defence in a claim petition filed under S. 163-A or S. 166 of the Motor Vehicles Act, 1988 inter alia in terms of S. 149(2)(a)(ii) of the said Act. The

breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub section (2)(a)(ii) of S. 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

It is beyond any doubt or dispute that under S. 149(2) of the Act an insurer, to whom notice of the bringing of any proceeding for compensation has been given, can defend the action on any of the grounds mentioned therein. However, Cl. (a) opens with the words 'that there has been a breach of a specified condition of the policy', implying that the insurer's defence of the action would depend upon the terms of the policy. The said sub clause contains three conditions of disjunctive character, namely, the insurer can get away from the liability when (a) a named person drives the vehicle; (b) it was being driven by a person who did not have a duly granted licence; and (c) driver is a person disqualified for holding or obtaining a driving licence. Note of the fact is also to be taken that whereas in S. 3 the words used are 'effective licence', it has been differently worded in S. 149(2) i.e. 'duly licensed'. If a person does not hold an effective licence as on the date of the accident, he may be liable for prosecution in terms of S. 141 of the Act but S. 149 pertains to insurance as regard third party risks. A provision of a statute which is penal in nature vis a vis a provision which is beneficent to a third party must be interpreted differently. It is also well known that the provisions contained in different expressions are ordinarily construed differently. The words 'effective licence' used in S. 3, therefore, cannot be imported for sub section (2) of S. 149 of the Motor Vehicles Act. The words 'duly

licensed" used in sub section (2) of S. 149 are used in past tense. The Insurance Companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them. The Court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case. Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insured under S. 149(2) of the Act. The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case."

##. Recently, in case of POONAMDEVI AND ANOTHER V. DIVISIONAL MANAGER,NEW INDIA ASSURANCE CO.LTD AND OTHERS, 2004 [3] SCC 386, the Apex Court has considered the issue. The observations made in para-1 & 2 are relevant in the facts and circumstances of the case and therefore, quoted as under:

"1. In a motor vehicle accident, one Sanjiv Kumar Jha died at the spot. Consequently, the appellants filed their claims petition before the Motor Accident Claims Tribunal, Bhagalpur. Before the Tribunal, the respondent Insurance Company neither pleaded nor led any evidence that the driver of the truck did not have any licence. The Tribunal by an order dated 12.2.1999 gave an award for a sum of Rs.3,91,500.00 Aggrieved, the respondent Insurance Company preferred an appeal

before the High Court. A learned single Judge of the High Court dismissed the appeal on the ground that the same was not maintainable. Aggrieved, the respondent Insurance Company further filed a letters patent appeal before the High Court. The Letters Patent Bench set aside the order of the learned Single Judge and remitted the matter back upon framing issues for determination by the single Judge. It is against the said judgment, the appellants are in appeal before us.

2. In National Insurance Co. Ltd. Chandigarh v. Nicolletta Rohtagi and others, 2002 (7) SCC 456 it was held that the insurance company cannot challenge the quantum of compensation awarded by the Tribunal. The only ground open to the insurer is contained in Section 149(2) of the Motor Vehicles Act. In National Insurance Co. Ltd. v. Swaran Singh and others, 2004 (1) Scale 180, this Court has held that 'mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence or failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding the use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time' In the present case, the insurer has not led any evidence that the driver of the vehicle had no licence. The burden of proof that the driver had no licence was open to the insurer which it failed to discharge."

##. According to our opinion, the Tribunal has rightly appreciated the oral evidence including the cross examination and properly read evidence and for that, the Tribunal has not committed any error. The conclusion reached by the Tribunal is based on the legal evidence. According to our opinion, the Tribunal has rightly apprised the oral and documentary evidence and also considered both examination in chief as well as cross examination of the concerned witnesses. Moreover, finding of fact, we would not like to disturb in the absence of clear evidence and perversity of approach by the Tribunal on this question.

##. The Apex Court has also taken similar view in case of NATIONAL INSURANCE COMPANY vs. RAM KALI AND OTHERS, 2004 [1] SCC 565 and NATIONAL INSURANCE COMPANY V. SAVITRIDEVI 2004 [1] SCC pg.596. Even in case of NEW INDIA ASSURANCE COMPANY LTD. V. MANJEETKAUR AND OTHERS, 2004 [2] GLR 984.

##. In case of NEW INDIA ASSURANCE CO. LTD V. MANJIT DAUR AND OTHERS, 2004 [2] G.L.R. 984, the Apex Court has dealt with issue involved in the present case. Observations made by the Apex Court in aforesaid case reads as under :

"This Special Leave Petition is directed against a judgment and order dated 12.12.2002 passed by the High Court of Punjab and Haryana at Chandigarh whereby and whereunder it affirmed the award passed by Motor Accident Claims Tribunal, Ropar in Case No.119 of 8.12.2000. The question raised in the special leave petition is as to whether in view of the finding of the learned Tribunal that the driver of the Maruti car was not holding a driving licence and particularly when he happened to be the owner of the vehicle, the learned Tribunal as well as the High Court committed an error in passing the impugned judgment.

2. Keeping in view of the fact that both the Tribunal and the High Court had recorded that the petitioner would be entitled to realise the amount of compensation as assessed from the driver of the offending vehicle, this Court do not intend to exercise its discretionary jurisdiction under Article 136 of the Constitution of India, particularly, having regard to its decision in S.L.P. [Civil] No.9027 of 2003 [reported in National Insurance Co.Ltd. v. Swaran Singh & Ors., 2004 [2] GLR 989 (SC)], no question to exercise discretionary jurisdiction in the matter. The petition is dismissed."

##. In case of POONAMDEVI vs. D.M. NEW INDIA ASSURANCE CO. LTD., 2004 AIR SCW 1308, the Apex Court has considered this question. Relevant observations made in para-1 & 2 are quoted as under :

"1. In a motor vehicle accident, one Sanjiv

Kumar Jha died at the spot. Consequently, the appellants filed their claims petition before the Motor Accident Claims Tribunal, Bhagalpur. Before the Tribunal, the respondent Insurance Company neither pleaded nor led any evidence that the driver of the truck did not have any licence. The Tribunal by an order dated 12.2.1999 gave an award for a sum of Rs.3,91,500.00 Aggrieved, the respondent Insurance Company preferred an appeal before the High Court. A learned single Judge of the High Court dismissed the appeal on the ground that the same was not maintainable. Aggrieved, the respondent Insurance Company further filed a letters patent appeal before the High Court. The Letters Patent Bench set aside the order of the learned Single Judge and remitted the matter back upon framing issues for determination by the single Judge. It is against the said judgment, the appellants are in appeal before us.

2. In National Insurance Co. Ltd. Chandigarh v. Nicolletta Rohtagi and others, 2002 (7) SCC 456 it was held that the insurance company cannot challenge the quantum of compensation awarded by the Tribunal. The only ground open to the insurer is contained in Section 149(2) of the Motor Vehicles Act. In National Insurance Co. Ltd. v. Swaran Singh and others, 2004 (1) Scale 180, this Court has held that 'mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence or failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding the use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time' In the present case, the insurer has not led any evidence that the driver of the vehicle had no licence. The burden of proof that the driver had no licence was open to the insurer which it failed to discharge."

##. The second contention raised by the learned advocate Mr.Nanavati that the rate of interest may be reduced. We have given our thoughtful consideration to the contention in light of the fact that accident occurred in the year

1992. The rate of interest prevailing at the relevant time was rightly taken into consideration by the Tribunal as well as looking to the tragic accident, the conclusion arrived at by the Tribunal, seems to be rightly taken by the Tribunal awarding interest at the rate of 15% p.a. to the compensation awarded by the Tribunal. It is necessary to note that from the date of award passed by the Tribunal till date not a single pie has been paid to the claimants except interim compensation of Rs.25,000/-. The total amount has been kept with the Insurance Company as per the interim order passed by the Division Bench of this Court and that amount with interest has been utilised by the Insurance Company in their business. Therefore, naturally insurance company is liable to pay 15 % interest from the date of application till the date of actual realisation by making payments to the claimants. It is relevant to note that stay has been obtained by the Insurance Company for not making any payment to the claimants. The party obtained stay and not to discharge legal obligations and then ultimately, if the party fails, in that case, the party shall have to restore the original situation in favour of the persons / party the Court has passed the order. The claimants have legal right of restitution and therefore, according to our opinion, the claimants are entitled to 15 % interest as directed by the Tribunal and the appellant insurance company is under legal obligation to pay 15 % interest upon the awarded amount from the date of application till the amount is realized by the claimants. The apex court has examined the principles of restitution in case of South Eastern Coalfields Ltd. v. State of M.P. and others reported in 2003 AIR SCW 5258. In the said reported decision, the apex court has considered the case where by obtaining an interim order, some restrictions were imposed against the defendant and ultimately, the petition was dismissed and the loss caused to the defendant because of the operation of the interim orders against him and, therefore, the defendant has been compensated by the apex court by directing to pay the said amount with interest examining the principles of restitution under section 144 of the Code of Civil Procedure which has been statutorily recognised and also considering a pre existing rule of justice, equity and fair play for restitution of the original situation by making or by ordering necessary payment of interest to an aggrieved party. This aspect has been examined by the apex court in a reverse case. Relevant observations made by the apex court in para 24, 25 and 26 of the said decisions (page 5270 to 5272) are reproduced as under:

24. In our opinion, the principle of

restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (See Zafar Khan & Ors. v. Board of Revenue, UP & Ors AIR 1985 SC 39). In law, the term 'restitution' is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, P. 1315), the Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for inquiry done. "Often, the result in either meaning of the term would be the same..... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non tortious misrepresentation, the measure of recovery is not rigid but as in other cases of restitution, such factors as relative fault, the agreed upon risks and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed". The principle of restitution has been statutorily recognized in Is. 144 of the Code of Civil Procedure, 1908. Section 144 of the CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against

it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party who has gained by the interim order of the Court so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the Court at the stage of final decision, the Court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

25. Section 144 of the CPC is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from S.144, the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwadi (1922) 49 IA 351, their Lordships of the Privy Council said : "It is the duty of the Court under Is. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved. Cains, LC said in Rodger v. Comptoir d' Escompte de Paris, (1871) LR 3 PC : "One of the first and highest duties of all the Courts is to take care that the act of the Courts does not injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the Case "This is also on the principle that a wrong order should

not be perpetuated by keeping it alive and respecting it, AA Nadar v. SP Rathinasami (1971) 1 MLJ 220. IN the exercise of such inherent power the Courts have applied the principles of restitution to myraid situations not strictly falling within the terms of Is. 144.

26. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court, the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate the court would act in conjunction with what is the real and substantial justice. The inquiry, if any, caused by the act of the Court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders

> favorably to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then, the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation."

The Apex Court has further observed that once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution and that such interest is not controller by the provisions of the Interest Act of 1839 of 1978. In the instant case, according to our opinion, the doctrine of restitution is attracted.

##. In view of aforesaid discussion, according to our opinion, the tribunal has rightly examined the issue and rightly decided the contention raised by the appellant insurance company. In our opinion, the appellant insurance company has failed to discharge their case before tribunal that Exh.114 was false document. The appellant company has also failed to prove before the tribunal that driver was disqualified for valid licence. The appellant company has not examined the owner to prove the breach of conditions of the insurance policy. The appellant company has also not proved before the tribunal that intentionally knowing full well by the stand of the owner that the driver was not possessing valid licence even though the driver was sent for driving the vehicle. These were the requirements as per the decisions of the Apex Court referred to above and therefore, according to our opinion, the appellant has failed to discharge these obligations by leading proper evidence. Therefore, according to our view, there is no error committed by the tribunal while passing the award in question and reasoning given by the Tribunal is correct based on legal evidence. Thus, the tribunal has rightly appreciated the oral evidence led by the insurance company. The finding is not baseless and perverse and therefore, according to our opinion, there is no substance in the present group of appeals and the same deserve to be dismissed.

In view of aforesaid discussion, appeals of this group do not succeed and same are dismissed. No order as to costs.

The appellant United India Insurance Co. Ltd. is directed to pay the award amount with cost and interest as directed by the Tribunal and as per the undertaking given to this Court in pursuance of the interim order dated 7th January, 1997 within four weeks.

No order on Civil Application No.7594 of 2003 and the same stands disposed of accordingly.

[Bhawani Singh]
Chief Justice

Date : /10/2004 [H.K.Rathod]
Judge

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